

§ 17.33 Adjudicative Process for contract disputes.

(a) The Adjudicative Process for contract disputes will be commenced by the ODRA Director upon being notified by the ADR neutral or by any party that either—

(1) The parties will not be attempting ADR; or

(2) The parties have not settled all of the dispute issues via ADR, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.

(b) In cases initiated by a contractor against the FAA, within twenty (20) business days of the commencement of the Adjudicative Process or as scheduled by the ODRA, the Product Team shall prepare and submit to the ODRA, with a copy to the contractor, a chronologically arranged and indexed substantive response, containing a legal and factual position regarding the dispute and all documents relevant to the facts and issues in dispute. The contractor will be entitled, at a specified time, to supplement the record with additional documents.

(c) In cases initiated by the FAA against a contractor, within twenty (20) business days of the commencement of the Adjudicative Process or as scheduled by the ODRA, the contractor shall prepare and submit to the ODRA, with a copy to the Product Team counsel, a chronologically arranged and indexed substantive response, containing a legal and factual position regarding the dispute and all documents relevant to the facts and issues in dispute. The Product Team will be entitled, at a specified time, to supplement the record with additional documents.

(d) Unless timely objection is made, documents properly filed with the ODRA will be deemed admitted into the administrative record. Discovery requests and responses are not part of the record and will not be filed with the ODRA, except in connection with a motion or other permissible filing. Designated, relevant portions of such documents may be filed, with the permission of the ODRA.

(e) The Director of the ODRA shall assign a DRO or a Special Master to conduct adjudicatory proceedings, develop the administrative adjudication

record and prepare findings and recommendations for the review of the ODRA Director or the Director's designee.

(f) The DRO or Special Master may conduct a status conference(s) as necessary and issue such orders or decisions as are necessary to promote the efficient resolution of the contract dispute.

(g) At any such status conference, or as necessary during the Adjudicative Process, the DRO or Special Master will:

(1) Determine the appropriate amount of discovery required;

(2) Review the need for a protective order, and if one is needed, prepare a protective order pursuant to § 17.9;

(3) Determine whether any issue can be stricken; and

(4) Prepare necessary procedural orders for the proceedings.

(h) Unless otherwise provided by the DRO or Special Master, or by agreement of the parties with the concurrence of the DRO or Special Master, responses to written discovery shall be due within thirty (30) business days from the date received.

(i) At a time or at times determined by the DRO or Special Master, and in advance of the decision of the case, the parties shall make individual final submissions to the ODRA and to the DRO or Special Master, which submissions shall include the following:

(1) A statement of the issues;

(2) A proposed statement of undisputed facts related to each issue together with citations to the administrative record or other supporting materials;

(3) Separate statements of disputed facts related to each issue, with appropriate citations to documents in the Dispute File, to pages of transcripts of any hearing or deposition, or to any affidavit or exhibit which a party may wish to submit with its statement;

(4) Separate legal analyses in support of the parties' respective positions on disputed issues.

(j) Each party shall serve a copy of its final submission on the other party by means reasonably calculated so that the other party receives such submissions on the same day it is received by the ODRA.

(k) The DRO or Special Master may decide the contract dispute on the basis of the administrative record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, direct the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Evidentiary hearings on the record shall be conducted by the ODRA:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the contract dispute, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(l) The DRO or Special Master shall prepare findings and recommendations, which will contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, and a recommendation for a final FAA order.

(m) The DRO or Special Master shall conduct a de novo review using the preponderance of the evidence standard, unless a different standard is prescribed for a particular issue. Notwithstanding the above, allegations that government officials acted with bias or in bad faith must be established by clear and convincing evidence.

(n) The Director of the ODRA may review the status of any contract dispute

in the Adjudicative Process with the DRO or Special Master.

(o) A DRO or Special Master shall submit findings and recommendations to the Director of the ODRA or the Director's designee. The findings and recommendations will be released to the parties and to the public, upon issuance of the final FAA order in the case. Should an ODRA protective order be issued in connection with the contract dispute, or should the matter involve proprietary or competition-sensitive information, a redacted version of the findings and recommendations omitting any protected information, shall be prepared wherever possible and released to the public, as soon as is practicable, along with a copy of the final FAA order. Only persons admitted by the ODRA under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.

(p) Attorneys' fees of a qualified prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. 504(a)(1). See 14 CFR part 14.

(q) Other than communications regarding purely procedural matters or ADR, there shall be no substantive *ex parte* communication between ODRA personnel and any principal or representative of a party concerning a pending or potentially pending matter. A potential or serving ADR neutral may communicate on an *ex parte* basis to establish or conduct the ADR.

Subpart D—Alternative Dispute Resolution

§ 17.35 Use of alternative dispute resolution.

(a) By statutory mandate, it is the policy of the FAA to use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA. The ODRA therefore uses voluntary ADR as its primary means of resolving all factual, legal, and procedural controversies.

(b) The parties are encouraged to make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case. The ODRA uses ADR techniques such as mediation, neutral evaluation, binding arbitration or variations of these